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Twenty-ninth session

SUMMARY RECORD OF THE 590th MEETING

Held at Headquarters, New York,
on Friday, 31 May 1996, at 3 p.m.

Chairman: Mrs. PIAGGI de VANOSSI (Argentina)

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The meeting was called to order at 3.05 p.m.

ELECTRONIC DATA INTERCHANGE: DRAFT MODEL LAW; POSSIBLE FUTURE WORK (continued) (A/50/17; A/CN.9/421 and 426)

Article 13

1. Mr. SORIEUL (International Trade Law Branch) introduced article 13 of the Draft UNCITRAL Model Law on Legal Aspects of Electronic Data Interchange (EDI) and Related Means of Communication. Article 13 dealt with the formation and validity of contracts and reaffirmed the principle set forth in article 4, which stipulated that a contract could not be denied validity or enforceability on the sole ground that a data message was used in its formation. Article 13, paragraph 2, provided for possible exceptions to the provisions contained in paragraph 1.

2. Mr. ABASCAL (Mexico) proposed to delete the phrase "unless otherwise agreed by the parties" in the first sentence of article 13, paragraph 1, to avoid confusion with article 10, which already contained a reference to contractual freedom.

3. Mr. SANDOVAL LÓPEZ (Chile) suggested that in the Spanish version of paragraph 1 the word "formación" should be replaced by the word "perfeccionamiento" and that "existencia" and "validez" should be used rather than "exigibilidad" because they were more faithful translations of the English.

4. Mr. BURMAN (United States of America) endorsed the current draft of article 13 as amended by the representative of Mexico.

5. Mr. CHOUKRI (Observer for Morocco) agreed that the content of article 13 was extremely important, but opposed its current wording. He proposed that the first paragraph should be broken up into two paragraphs; the first would correspond to the existing first sentence of paragraph 1 and the second would read "Contracts made by means of the use of data messages would have the same enforceability as contracts originating from the use of other well-known means of communication". The new version would eliminate the reference to any "denial of validity or enforceability."

6. Mr. MADRID (Spain) endorsed the current wording of article 13 with the deletion proposed by the representative of Mexico and the changes to the Spanish version proposed by the representative of Chile. His delegation believed that the essence of article 13 resided in the second paragraph rather than in the first, which reaffirmed the ideas expressed in article 4 and article 10. Paragraph 2 of article 13 enabled States to make specific exclusions in the area of contracting.

7. Mr. TELL (France) endorsed the current wording of article 13, as amended by the representative of Mexico.

8. Mr. ABASCAL (Mexico) disagreed with the changes proposed by the representative of Chile, as he believed the term "perfeccionamiento" in Spanish

referred to the "execution" rather than "formation" of a contract and would change the meaning of the Spanish text.

9. Mr. ALLEN (United Kingdom) favoured retaining the current draft of article 13, including the phrase "unless otherwise agreed by the parties", which was essential to cover the case of master agreements which might stipulate that subsequent agreements could only be concluded by an offer and acceptance in writing. Article 10 did not deal sufficiently with such exceptions.

10. Mr. MASUD (Observer for Pakistan) stressed that the provisions of article 12, paragraph 3, were relevant to the idea expressed in article 13. He therefore proposed that article 13, paragraph 1, should be made subject to the provisions of article 12, paragraph 3.

11. Mr. FERRARI (Italy) favoured the use of the Spanish term "formación", which was consistent with other official texts published by UNCITRAL.

12. In response to the view expressed by the representative of Pakistan, he emphasized that article 13 in no way related to the process of offer and acceptance, but rather to the form an offer or acceptance might take, and was meant specifically to inform a legislator that a contract would be deemed valid even when either the offer or the acceptance was in the form of a data message. He therefore favoured retaining article 13 as drafted and could agree to either the deletion or retention of the phrase "unless otherwise agreed by the parties". None the less he wished to point out that article 10 did indeed cover master agreements, since such agreements did contain an agreement between the parties regarding the communication of data messages.

13. Mr. SORIEUL (International Trade Law Branch) agreed with the representative of Italy that it was necessary to adopt terminology that was consistent with the terminology used in previous documents. It was the work of the drafting group to deal with the various language versions of the text at hand.

14. The CHAIRMAN said that if she heard no further comments she would take it that the majority of delegations favoured adopting article 13 as originally drafted.

15. Mr. ABASCAL (Mexico), supported by Mr. CHOUKRI (Observer for Morocco), Mr. ANDERSEN (Observer for Denmark) and Ms. REMSU (Observer for Canada), said that his delegation had recommended the deletion of the phrase "unless otherwise agreed by the parties", and he believed that, with the exception of the United Kingdom, most delegations supported that proposal.

16. Mr. ADENSAMER (Austria) said that his delegation favoured retaining article 13 as originally drafted, including the phrase "as otherwise agreed by the parties", which was consistent with the idea expressed in article 10 and also highlighted the principle of party autonomy. Moreover, retention of the phrase would in no way harm the purity or clarity of the text.

17. Mr. FERRARI (Italy) said that while his delegation favoured retaining article 13 as drafted, it could also agree with the deletion proposed by the representative of Mexico. In that regard, he stressed that the principle of the

party autonomy was sufficiently covered elsewhere in the Model Law and was in fact a general principle underlying the Model Law.

18. Mr. ALLEN (United Kingdom), supported by Mr. ZHANG Yuqing (China), said that the words "unless otherwise agreed by the parties" should be retained; their retention would do no harm, even though several delegations felt that their deletion would do considerable harm. Article 10 did not cover the case at hand; article 13 was expressed in general terms and applied to any contract, whether or not the parties were communicating by means of data messages.

19. Mr. SANDOVAL LÓPEZ (Chile) agreed with the representative of Mexico that the phrase should be deleted.

20. Mr. ABASCAL (Mexico) said that article 10 applied to situations where the parties were communicating by means of data messages. To retain the phrase under discussion would lead to a narrow interpretation of article 13, whereas the Commission had intended its applicability to be very broad. He drew attention to the comments of his Government on article 13 contained in document A/CN.9/409/Add.1.

21. Mr. SORIEUL (International Trade Law Branch) suggested that those who favoured the deletion of the phrase should explain their position clearly.

22. Mr. BURMAN (United States of America) pointed out that similar phrases were present in article 14. However, while his delegation had initially supported the deletion of the phrase from article 13, he did not see what harm would be done by retaining it.

23. Mr. ABASCAL (Mexico) said that there was a danger that the text might be interpreted in such a way as to make the applicability of article 10 excessively narrow.

24. The CHAIRMAN suggested that that issue could be made clear in the Guide to Enactment.

25. Mr. ABASCAL (Mexico) said that that would be acceptable.

26. Mr. ALLEN (United Kingdom) said that article 10 clearly would apply to the formation of contracts, but only if the parties were communicating by means of data messages. The Commission should adopt a policy of caution and retain the language as it stood.

27. Mr. ZHANG Yuqing (China) said that retention of the words "unless otherwise agreed by the parties" was desirable, since it would give the parties more room for manoeuvre in the formation of contracts.

28. Mr. MADRID (Spain) said that it would be preferable to delete the phrase in the interests of a suitably broad interpretation of article 10, which was not intended to apply only to agreements concluded by electronic means.

29. Mr. ANDERSEN (Observer for Denmark) said that since a number of delegations felt strongly about it, the phrase should be retained.

30. Mr. BISCHOFF (Observer for Switzerland) pointed out that both articles 10 and 13 came under the heading of chapter III; article 10 would therefore apply to articles 11, 12, 13 and 14. In deciding whether the phrase should be deleted, the Commission should bear in mind the impact of such a decision on article 14.

31. The CHAIRMAN suggested that the Commission could agree to retain the phrase, provided that the intended interpretation was clearly stated in the Guide to Enactment.

32. Mr. ABASCAL (Mexico) said that his delegation would submit to the generally held view.

33. Mr. CHOUKRI (Observer for Morocco) supported the remarks of the observer for Switzerland and said that his delegation still supported deletion of the phrase.

34. Mr. LEBEDEV (Russian Federation) said that in the interest of compromise, the phrase should be retained; however, the Commission's report should reflect the widely held view that the phrase was unnecessary. Such a stipulation would be useful when the Model Law was enacted in individual countries.

35. Mr. SORIEUL (International Trade Law Branch) said that the views expressed during the current discussion would be reflected in the Commission's report to the General Assembly and in the Guide to Enactment.

36. Ms. REMSU (Observer for Canada), speaking also on behalf of the Australian delegation, said that it had not been demonstrated that any harm would be done by retaining the phrase. In the interest of compromise, the wording of article 13 should be adopted without any change.

37. Mr. BURMAN (United States of America) said that it would be necessary to return to the matter when the final language of article 10 was discussed. His delegation's interpretation of the relationship between articles 10 and 13 was completely different from that of the delegation of the United Kingdom. It had been the clear intent of the Commission that articles 10 to 14 should cover the autonomy of the parties to contract separately as between themselves, and that fact should be reflected in the Commission's report.

38. Mr. ABASCAL (Mexico) reiterated his earlier comment concerning the excessively narrow interpretation of article 13; that article should not be restricted solely to the formation of contracts.

39. Mr. ANDERSEN (Observer for Denmark) agreed with the point made by the representative of Mexico. However, article 4 already contained wording which should meet that requirement.

40. Mr. BURMAN (United States of America) said that it would be useful to broaden the applicability of article 13 as suggested by the representative of Mexico. He wondered whether the latter could draft appropriate wording to enable the Commission to consider the issue at a later time.

The meeting was suspended at 4.30 p.m. and resumed at 4.50 p.m.

41. Mr. ABASCAL (Mexico), referring to the point made by the observer for Denmark, said that article 4 recognized the validity of data messages as such; however, article 13 had been included because in practice there were systems which could issue manifestations of will - offers and acceptances - because they had been programmed to do so, without any human intervention. Some delegations had felt that the act of programming a computer was a manifestation of will, others that it was an implied responsibility. His Government had proposed an expansion of the principle of article 13 to other acts which involved negotiable manifestations of will. He therefore proposed the addition of a new paragraph 2 to article 13, with the existing paragraph 2 becoming paragraph 3. The new paragraph 2 would read: "Where a data message is used in a transaction, that transaction shall not be denied validity or enforceability on the sole ground that that data message was used.

42. Mr. FERRARI (Italy) said that his delegation supported that proposal. However, the word "transaction" suggested two parties; it might be better to use the word "communication", to cover such situations as notification regarding non-conformity of goods, which was a unilateral act.

43. Mr. CHANDLER (United States of America) said that his delegation also found the Mexican proposal very useful. In order to meet the concern expressed by the representative of Italy, the words "or other commercial communication" could be inserted after "transaction", so as to cover unilateral statements with commercial and contractual implications.

44. Mr. TELL (France) said that his delegation also supported the Mexican proposal. However, it had difficulty with the word "opération" ("transaction"), which had no legal meaning in French law. The Commission also needed to determine whether it was necessary to change the title of article 13 if its scope was to be expanded.

45. Mr. SORIEUL (International Trade Law Branch) said that for some years there had been problems with the translation into other languages of the word "transaction", but it might be a good idea to conform with past usage. Since the Mexican proposal referred to the validation of manifestations of will by electronic means, a solution might be to use the words "manifestation of will", thereby avoiding problems of terminology.

46. Mr. FERRARI (Italy) said that his delegation strongly supported the suggestion by the representative of the United States of America but would prefer not to use the word "commercial" since article 1, which defined the sphere of application, expressly referred to commercial activities.

47. There would be a problem in using the words "manifestation of will" because in a number of countries notification of non-conformity, for example, was not considered to be a declaration of will, but a declaration of science. The wording suggested by the representative of the United States of America might be the best, since it would cover both types of declaration.

48. Mr. UCHIDA (Japan) said that his delegation was opposed to the inclusion of the new paragraph 2. The term "transaction" covered unilateral legal act; however, as a matter of policy, his delegation did not feel that unilateral legal acts should be included within the scope of article 13. It could be a surprise to the other party if, for example, a cancellation could be made by way of a data message without prior agreement.

49. Mr. ALLEN (United Kingdom) said that his delegation would not oppose the inclusion of a paragraph along the lines suggested by the representative of Spain. It felt that the word "communication" was better than "transaction", especially if it was more acceptable in jurisdictions in which the word "transaction" had no clear legal meaning, and would prefer "communication" to "manifestation of will", although if there was general support for the latter formulation his delegation would not oppose it.

50. The proposed new paragraph was more akin to article 4 than to the provisions in chapter III. Like article 4, the new provision was entirely general: it applied to unilateral communications, not just cases in which parties were communicating by means of data messages on both sides. It would therefore make more sense for it to be included as a separate provision after article 4, because the intention was to ensure that the requirements for writing and other formalities did not have a restrictive effect which would prevent validity being given to expressions of will by means of data messages. If the new paragraph was included in chapter II, it would be necessary to ensure that article 13, paragraph 2, applied to it.

51. Mr. SANDOVAL LÓPEZ (Chile) said that his delegation supported the Mexican proposal. However, the word "transaction" had an economic rather than a legal sense, and his delegation would prefer "manifestation of will".

52. Mr. ABASCAL (Mexico) said that his delegation's original proposal, reproduced in document A/CN.9/409/Add.1, used the term "manifestation of will", but it seemed that some delegations found that wording too broad. As to the difficulties associated with the use of the word "transaction", because international trade law instruments needed to be uniformly adopted, it was sometimes necessary to move away from traditions and precise meanings of terminology in individual legal systems. His delegation would have no difficulty with the suggestion put forward by the representative of the United States of America.

53. Mr. ZHANG Yuqing (China) said that the word "transaction" referred to the sale of goods, from the making of offers to payment, while article 13 referred only to "contract formation", although that could include transport, insurance and banking enterprises, and other parties, which would complicate the Commission's work. The terms "communication" and "manifestation of will" could have many different meanings. Article 1 referred to "any kind of information", which already included all those meanings. The use of the word "transaction" would then extend the scope too much. His delegation therefore suggested that the Commission should return to the secretariat's version of article 13, rather than spending more time on the word "transaction".

54. Mr. CHOUKRI (Observer for Morocco) said that his delegation felt that the first version of article 13 was clearer than the new version. Article 13 referred to "contract formation", and a transaction was only one part of that process. "Enforceability" and "validity" referred to contracts; in manifestations of will, there must be no error and no coercion. The word "transaction" had a commercial, not a legal meaning, and was very broad; article 13 was concerned with the validity and enforceability of contracts, not transactions.

55. Mr. TELL (France) said that it was necessary to determine what was meant, in the legal sense, by "commercial communication", which could, for example, mean either advertising or an offer, in which case paragraph 1 applied. Article 4 referred to "information" in general. To some extent, the hypothesis of a commercial communication was already covered by that article. The word "transaction" generally meant a contract, or an offer, which was covered by article 13, paragraph 1. It might be better to use the words "manifestation of will" or "legal acts", which would include contracts.

56. Mr. MADRID (Spain) said that the Commission must decide whether there was any advantage in including the new paragraph. It had been felt that in some situations, article 4 was not sufficient to cover the possibility of using data messages for information. The new paragraph must embody the idea of manifestation of will, but should not overlap with paragraph 1 (offer and acceptance of an offer). Since the word "transaction" posed problems, his delegation preferred "manifestation of will"; "legal acts" could be too technical in some legal systems, and too imprecise in others.

57. Mr. FERRARI (Italy) said that article 13, paragraph 1, covered both offer and acceptance and was therefore applicable to all contracts. He suggested embracing the spirit behind the Mexican proposal and inserting the word "communication", as suggested by the United States delegation. The terms "legal act" and "declaration of will" should not be used for similar reasons. He proposed that the new paragraph 2 should read "Any communication shall not be denied legal effectiveness, validity or enforceability solely on the grounds that it is in the form of a data message." That would bring it into line with the wording used in article 4.

58. Mr. UCHIDA (Japan) said that if the new paragraph 2 was adopted, a party to a contract could cancel the contract without any prior agreement, to the surprise of the other party.

59. Mr. FERRARI (Italy) said that the only new point that the proposed new paragraph would add to contract law had to do with whether the data message could be used. No one could be surprised by receiving a notification of cancellation because the right to void or cancel a contract was either permissible under the applicable law or it was not.

60. Mr. ABASCAL (Mexico), referring to the concern raised by the representative of Japan, said that a contract could indeed be considered to be terminated in the spirit of the proposal. If the Model Law did not contain a clear stipulation that a contract could not be changed or ended except in writing, a contract could be considered terminated by means of an electronic message or an

EDI message and yet there could still be doubt as to whether the notification was a manifestation of appropriate will. The proposal was intended to make clear that such manifestation of will existed. He was not opposed to the use of "manifestation of will", which were the very words used by the Government of Mexico in its original observations. He had changed the term at the suggestion of a number of delegations who had felt it might be too broad.

61. Mr. ZHANG Yuqing (China), referring to the suggestion of the representative of Italy to replace the word "transaction" by the word "communication", said that the meaning of the latter term in Chinese could be very confusing. In fact, it had no legal meaning in his language. As his delegation saw it, letters, telephone calls and facsimile messages were all forms of communication, which was a tool for transmitting information. If the word was understood to mean information, then a separate provision would be required.

62. Mr. LEBEDEV (Russian Federation) said that the serious problem raised by the representative of Mexico appeared to be covered by article 4 of the Model Law. If that was not the case, and the proposal by the representative of Mexico to use the term "communication" or "statement" was accepted, a separate paragraph in article 13 would not be necessary. The words "the same rules apply to communication or statements of the parties" could be added to that article, bearing in mind that such communications or statements might be made by data message, a mode of transmittal that did not, in fact, affect their legal validity or enforceability. That would be the best way to solve the problem in paragraph 1, although, as noted by the representative of France, the title of article 13 would have to be changed.

63. Expressions such as "statement" and "communication" on the one hand and "information" as used in article 4 on the other hand, reflected concepts which were basically identical. Over and above the difficulty of interpreting the concept of "communication" in itself, there was the additional problem of distinguishing between "information" as defined in article 4 and "communication" as the term would be used in article 13. Furthermore, it was very clear that terms such as "communication" and "statement" in article 13 would have to be subject to the rules set out in articles 5, 6 and 7 of the Model Law. If the proposal of the representative of Mexico was to use the term "communication" rather than the term "manifestation of will", then there would be no need to supplement the existing text; the problem was settled in article 4 by the word "information", which seemed to have a fairly broad meaning in order to encompass very different situations.

64. Mr. SORIEUL (International Trade Law Branch) said that the problems being encountered at the current meeting were no doubt linked to the redundancy between the provisions of article 4 and article 13. Once an exception had been made for contracts, it was logical that a proposal to expand the recognition of the validity beyond the scope of contracts to a set of acts by which a party might be led to produce legal effects by electronic communication should be put forward. Additional effort would be required to define the precise context of the concept that was intended to enjoy the same treatment as contracts, for if the Commission intended to use vague non-legal concepts such as "operation", "transaction" and "communication", then specific definitions of those concepts as used in the Model Law would have to be formulated. The authors of the

proposal and the delegations supporting it should draw up a list of three or four legal concepts which the Commission wished to have recognized in the context of article 13. If the Commission decided that it would be useful to include such a provision, the link between the new paragraph and paragraph 1 could then be determined.

65. Mr. FERRARI (Italy) said that his delegation had suggested the use of the word "communication" precisely because the term did not have specific legal meaning - it was neutral and sufficiently vague, in keeping with the international character of the Model Law, and prevented the introduction of new concepts which would only create more confusion. A similar approach had been used in other uniform UNCITRAL texts, such as the United Nations Convention on Contracts for the International Sale of Goods. Indeed, all the arguments adduced by the representative of China tended to justify the use of the word "communication".

66. Mr. ABASCAL (Mexico) said that it was indeed quite difficult to explain and justify the difference between article 4 and article 13. However, his delegation was actively seeking to resolve that problem. He agreed with the representative of Italy as to the use of legal terms. Concerning documents on uniform law, the use of legal terminology, which had very specific connotations in domestic systems, might have results that were opposite to the ends sought in formulating uniform law. He suggested that the word "statement" should be used instead of "transaction" or "communication".

67. Mr. CHANDLER (United States of America) said that the term "manifestation of will" appeared to enjoy a consensus and that, since it suited the purpose for which it had been proposed, the Commission should concentrate on it.

68. Mr. ZHANG Yuqing (China) said that article 13, paragraph 1, on formation and validity of contracts, would suffice. The Mexican proposal would extend its scope to include implementation and all other related issues. However, extending the scope of the article without a comprehensive debate beforehand might be hasty. If his memory served him right, communication dealt with form, namely, the will of one party expressed through writing to the other party. However, article 13 dealt not only with form but also with types of contracts expressed through the transmission of a data message. The article's function would be totally different from that of article 27. While he was not against expanding the scope of the article, he agreed with the representative of the secretariat on the need to limit such expansion.

The meeting rose at 6.05 p.m.